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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

DAVID ANTHONY BREAUX,

Petitioner,

v.

RON DAVIS, WARDEN, California
State Prison at San Quentin,

Respondent.

)
) Case No. 2:93-cv-00570-JAM-DB
)
) DEATH PENALTY CASE
)
) **JOINT REQUEST TO AMEND**
) **SCHEDULING ORDER; [PROPOSED**
) **ORDER]**

) Judge: The Honorable Deborah Barnes
)
)

1 On May 1, 2019, this Court ordered that “the parties shall complete any outstanding
2 discovery depositions and all depositions in lieu of testimony of witnesses, shall file final witness
3 lists for the evidentiary hearing, and shall informally provide the opposing party with any
4 outstanding discovery regarding witnesses who will testify at the evidentiary hearing.” (Doc.
5 318.) This Court also ordered exchange of exhibit lists by October 15, 2019, stipulations and
6 motions be agreed to and filed by October 31, 2019 and November 1, 2019, that pre-evidentiary
7 hearing motions be heard on November 15, 2019, and that the evidentiary hearing proceed on
8 December 9, 2019. (Docs. 318, 321.) Respondent and Petitioner would jointly request that this
9 Court amend the current scheduling order by vacating these dates, and setting the matter for a
10 joint proposed schedule for the reasons set forth below.
11

12 Respondent is still awaiting a Rule 26 Statement from petitioner’s *Strickland* expert,
13 which has been complicated by difficulty completing said expert’s outstanding financial
14 registration, plus opening a new contract and closing an old contract for the end of the fiscal
15 year. Moreover, the recent depositions of trial counsel, Thomas Wirtz and Richard Fathy have
16 expanded the scope of the expert’s report.
17

18 Since the last joint report, the parties have conducted discovery depositions of two of the
19 eight live witnesses expected for the evidentiary hearing, and have jointly interviewed a third
20 live witness, David Howard, in lieu of a discovery deposition. (Doc. 284.) A fourth live
21 witness, Abelardo Alvarado, has previously already been deposed. (Doc. 284.) Petitioner is the
22 only other live witness to be called, aside from the experts. (Doc. 284.) Therefore, Petitioner’s
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three experts are likely the only remaining witnesses who need to be deposed.¹

Respondent and Petitioner have previously conducted all outstanding testimonial depositions to date:² Stephen McEnerney, Mary Peinado (Lake County), Ben Ryan, Ken Lydon, Mark Stahley, Paul Mann, Linda Lye (San Francisco), Curvin Hunt (Kansas City, Missouri), Melvin Gonzales (Chowchilla State Prison), and Charles Gillespie. Respondent and Petitioner also jointly went to the Sacramento Superior Court to examine evidence in the case and stipulated to that evidence being transmitted to a laboratory for testing relevant to one of the claims. Respondent recently received the report on that evidence and disclosed it to petitioner.

In short, the parties have narrowed the amount of outstanding work to primarily Petitioner's three experts, and perhaps some rebuttal evidence or witnesses by Respondent. However, the parties need some additional time to complete final discovery before an evidentiary hearing goes forward. The parties have been able to work cooperatively on scheduling and do not anticipate difficulty informally exchanging discovery and setting any further discovery or testimonial deposition dates that may be needed before an evidentiary hearing. If the Court grants this request, the parties would request a date to submit a proposed scheduling order to this Court.

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¹ However, respondent may decide to re-depose trial counsel, or decide to depose petitioner in the first instance, after receiving the experts' reports. There is also a possibility that respondent will seek to retain an expert, or experts, based on the opinions in petitioner's experts' reports.

² Respondent recently attempted to depose a witness who is 85 years old, former court clerk Virginia Duffek, but was unable to due to an unexpected health issue. Respondent will attempt that testimonial deposition again if the Court gives the parties additional time to complete discovery in this case.

1 Dated: October 1, 2019

Respectfully Submitted,

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